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STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERAN AFFAIRS

Norwood R. F. Baybridge,  Petitioner	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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v.

City of Ortonville,

Respondent

This matter came on for hearing before Administrative Law Judge Linda F. Close on January 18, 2007, at the Big Stone County Court House in Ortonville, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated November 30, 2006, and signed by Commissioner of Veterans Affairs, Clark Dyrud. The record closed on January 24, 2007, upon receipt of letter briefs from counsel of record.

Craig O. Ash, Ortonville City Attorney, 25 N.W. Second St., Ortonville, MN 56278, appeared on behalf of the City of Ortonville (Respondent). Ronald R. Frauenshuh, Jr., 129 N.W. Second St., Ortonville, MN 56278, appeared on behalf of Norwood R. F. Baybridge (Petitioner).

### STATEMENT OF THE ISSUES

1. Is Petitioner a veteran within the meaning of the Veterans Preference Act (VPA) who was removed from his employment with the Respondent without being notified of the hearing rights under Minn. Stat. § 197.46?

2. If so, is Petitioner entitled to relief under Minn. Stat. § 197.481?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Petitioner is a veteran who was honorably discharged from the United States armed services in 1976.<sup>1</sup>

2. Petitioner is a licensed emergency medical technician (EMT). On December 5, 2004, he was hired by Respondent to work as a volunteer<sup>2</sup> EMT with the Ortonville Ambulance Service (the Service or the Ambulance Service), which is operated by Respondent.<sup>3</sup>

3. The Service has approximately sixteen volunteers. Volunteers meet monthly to sign up for their volunteer hours for the following month. In order of their seniority, volunteers sign up for twelve shifts plus one weekend. If any shifts remain unfilled after each volunteer has selected his or her twelve shifts and weekend, then volunteers may sign up for any unfilled shifts. This is also done by seniority.<sup>4</sup> Attendance at the monthly meetings is mandatory. If a volunteer must miss a meeting, the volunteer can request another volunteer to sign up on his or her behalf.<sup>5</sup>

4. On July 6, 2006, Petitioner and two other volunteers transferred a patient from the Ortonville Hospital to the Twin Cities. Petitioner rode in the back of the ambulance with a nurse, Carlin Keimig. Some time after the July 6<sup>th</sup> transfer, Ms. Keimig complained about Petitioner's conduct during the transfer. Ms. Keimig complained that Petitioner fell asleep during the transfer and used the ambulance phone to make four personal calls.<sup>6</sup>

5. Petitioner is a member of the National Disaster Medical System, which was part of the Federal Emergency Management Agency (FEMA) until recently. In July 2006, Petitioner was called up by FEMA to serve in Maryland. Petitioner served in Maryland from July 26 until October 2, 2006.<sup>7</sup>

6. Respondent's Service has a list of protocols and responsibilities for members of the Service. Violation of the protocols may result in discipline. The current list of protocols states that an EMT riding in the back of the ambulance must constantly monitor the patient's condition and provide appropriate care, even when a nurse-volunteer is present. The current list further makes it grounds for discipline for an EMT to sleep when the EMT should be doing patient care.<sup>8</sup> The protocol list in effect on July 6<sup>th</sup> did not include the

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<sup>1</sup> Testimony of Petitioner; Form DD 214, attached to the Notice of Petition and Order for Hearing.

<sup>2</sup> The parties agree that, for purposes of this hearing, Petitioner's status as a volunteer has no legal significance.

<sup>3</sup> Test. of Pet.

<sup>4</sup> Testimony of James Hasslen.

<sup>5</sup> Testimony of Tom Scoblic; Test. of J. Hasslen.

<sup>6</sup> Resp. Ex. A. As a nurse from the hospital, Ms. Keimig is not a volunteer, but she is considered a part of the Services team. Testimony of Kathleen Korth.

<sup>7</sup> Test. of Pet.

<sup>8</sup> Resp. Ex. B.

provision about the duties of the EMT riding in the back or specify that sleeping was grounds for discipline.<sup>9</sup> The current protocol list was revised, in part, because of the July 6<sup>th</sup> events reported by Ms. Keimig.<sup>10</sup>

7. Tom Scoblic is the Director of the Service. In early August 2006, Scoblic became aware, through oral communication, of Ms. Keimig's complaint about Petitioner's conduct during the July 6<sup>th</sup> transfer. Keimig did not provide a written complaint to Director Scoblic until August 21, 2006.<sup>11</sup>

8. The Service has a Board of three members, all of whom are volunteers with the Service. In August 2006, the three members were Kathleen Korth, James Hasslen, and Tom Scoblic. At its August 2006 meeting, the Board discussed Ms. Keimig's complaint and debated whether to discipline Petitioner based on the complaint. The Board also discussed other complaints about Petitioner, including his failure to drive fast enough and his lack of rapport with other volunteers. The Board also discussed whether Petitioner's conduct amounted to gross misconduct and thought it did. The Board ultimately decided to ask Petitioner to resign from the Service rather than dismiss him.<sup>12</sup>

9. At the time of the August Board meeting, Petitioner was still in Maryland for his FEMA service. On October 4, 2006, after Petitioner had returned home, Director Scoblic met with Petitioner. At the meeting, Scoblic told Petitioner about the complaint regarding the July 6<sup>th</sup> transfer and the complaints about Petitioner's rapport with other volunteers. Director Scoblic asked Petitioner for his resignation.<sup>13</sup>

10. Petitioner refused to resign. At some point during the conversation, Petitioner offered to turn in the pager he carried in order to respond to calls from the Service. Director Scoblic accepted that as an alternative to resignation, and he followed Petitioner to Petitioner's home, where the Director collected Petitioner's pager. Director Scoblic was not authorized to ask Petitioner for the pager.<sup>14</sup> At no time did Director Scoblic tell Petitioner that his employment with Respondent was terminated. Director Scoblic knew that Petitioner is a veteran and therefore could not be terminated without a hearing.<sup>15</sup> However, both the Director and Petitioner understood that turning in the pager meant that Petitioner could no longer take call.<sup>16</sup>

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<sup>9</sup> See Pet. Ex. Q.

<sup>10</sup> Test. of T. Scoblic.

<sup>11</sup> Test. of T. Scoblic; Resp. Ex. A.

<sup>12</sup> Test. of K. Korth; Test. of J. Hasslen.

<sup>13</sup> Test. of T. Scoblic.

<sup>14</sup> Test. of J. Hasslen.; Test. of K. Korth.

<sup>15</sup> Test. of T. Scoblic.

<sup>16</sup> Test. of Pet.

11. On October 10, 2006, Petitioner filed with Respondent a Petition for Hearing Pursuant to Minn. Stat. § 197.4581.<sup>17</sup> On October 24, 2006, Counsel for Respondent informed counsel for Petitioner that Petitioner's employment had not been terminated. He also told Petitioner's counsel that Petitioner had volunteered to turn in the pager. Counsel further informed Petitioner's counsel that the Ortonville City Council would consider allegations of Petitioner's misconduct at its November 6, 2006 meeting.<sup>18</sup>

12. At the November 6, 2006 City Council meeting, the Ambulance Board recommended disciplinary action against Petitioner. The recommended action was contained in a November 6, 2006, letter from the Service to the City Council. The recommendation allowed Petitioner to take call, subject to certain supervisory requirements. It also included a written warning.<sup>19</sup> The Council took no action to terminate Petitioner's employment.<sup>20</sup> At the close of the Council meeting, Director Scoblic understood he was to return Petitioner's pager and implement the Service's recommended disciplinary action against Petitioner.<sup>21</sup>

13. On November 7, 2006, Director Scoblic and Hasslen met with Petitioner. The Director had asked Hasslen to be present at the meeting because he had felt threatened by Petitioner at his October 10<sup>th</sup> meeting with Petitioner. Petitioner had clenched his fists and teeth, and Director Scoblic thought Petitioner might "throw a punch."<sup>22</sup> At the November 7<sup>th</sup> meeting, the Director read Petitioner letters of complaint from the Service medical director and other volunteers. Director Scoblic asked Petitioner to sign the November 6, 2006 letter recommending disciplinary action. Petitioner refused because he wished to discuss the letter with counsel.<sup>23</sup>

14. At the November 7, 2006 meeting, Director Scoblic returned Petitioner's pager. Petitioner asked whether he could sign up for call. The Director told Petitioner that he could, but that the November schedule was full. Petitioner looked at the November schedule and saw it was full.<sup>24</sup>

15. Petitioner did not attend the monthly Service meeting in November. Petitioner told the Director that he was dealing with a family matter and could not attend. At the November meeting, other Service volunteers signed up for December call. After the meeting, Petitioner called the Director and was told that

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<sup>17</sup> See Pet. Ex. D. The petition is referenced in Petitioner's Exhibit D, but it was not put into evidence.

<sup>18</sup> Pet. Ex. D

<sup>19</sup> Resp. Ex. D.

<sup>20</sup> Test. of T. Scoblic. The record is unclear exactly what action the Council took. From the ensuing events, it must be inferred that the Council approved the recommended disciplinary action.

<sup>21</sup> Test. of Scoblic.

<sup>22</sup> Test. of T. Scoblic.

<sup>23</sup> Test. of T. Scoblic; Test. of J. Hasslen.

<sup>24</sup> Test. of Pet.

only December 25<sup>th</sup> had not been filled. Petitioner took no call hours for December.<sup>25</sup>

16. By a letter dated December 14, 2006, Petitioner's counsel informed Respondent's counsel that Petitioner would not return to work until Respondent agreed to resolve what Petitioner viewed as a "hostile environment."<sup>26</sup>

17. On advice of his counsel, Petitioner did not attend the monthly Service meeting on December 14, 2006. At the December meeting, other volunteers filled the schedule for January. As a result, Petitioner had no call hours for January.<sup>27</sup>

18. On November 17, 2006, after the November monthly Service meeting, Petitioner filed a Petition for hearing with the Minnesota Department of Veterans Affairs alleging that he had been constructively discharged from his position as an EMT.<sup>28</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction to consider this matter under the VPA.<sup>29</sup>

2. The Department of Veterans Affairs gave proper notice of the proceedings and has complied with all relevant substantive and procedural requirements of law.

3. Petitioner was honorably discharged from the U.S. armed forces and is a veteran within the meaning of VPA.<sup>30</sup>

4. Respondent is a political subdivision of the State which is subject to the provisions of Minn. Stat. § 197.46.

5. The burden of proof is on Petitioner to prove by a preponderance of the evidence that his employment was terminated in violation of Minn. Stat. § 197.46.<sup>31</sup>

6. Petitioner has not proven, by a preponderance of the evidence, that Respondent terminated Petitioner's employment, constructively or otherwise.

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<sup>25</sup> Test. of Pet; Test. of T. Scoblic.

<sup>26</sup> Resp. Ex. C.

<sup>27</sup> Test. of Pet; Test. of T. Scoblic.

<sup>28</sup> Notice of Petition and Order for Hearing attachment.

<sup>29</sup> Minn. Stat. §§ 14.50; 197.46; 197.481.

<sup>30</sup> Minn. Stat. § 197.447.

<sup>31</sup> Minn. R. pt. 1400.7300, subp. 5.

7. Respondent has not violated Petitioner's rights under VPA.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

Based upon these Conclusions, the Administrative Law Judge recommends that: the Petition of Norwood R. F. Baybridge be DENIED.

Dated: February 1, 2007

s/Linda F. Close  
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LINDA F. CLOSE  
Administrative Law Judge

Reported: Taped, 6 tape(s)  
No transcript prepared

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Clark Dyrud, Commissioner of Veterans Affairs, Veterans Service Building, 20 West 12<sup>th</sup> St., Second Floor, St. Paul, MN 55155-2006, (651) 296-2562, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

Under the VPA, “no person holding a position by appointment or employment in the several counties, cities, towns, schools and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.”<sup>32</sup> The Minnesota Supreme Court has explained that “removal” under VPA may include employer actions that fall short of an explicit termination. Thus, it has construed removal to include employer actions that “make it unlikely or improbable that the veteran will be able to return to the job.”<sup>33</sup>

Petitioner, relying on cases of constructive removal, argues that he was discharged from his employment when he turned in his pager on October 4, 2006. A pivotal fact in resolving the issue of constructive removal is whether Petitioner volunteered his pager as an alternative to resignation or whether the Director asked Petitioner to turn it in. Petitioner testified that he asked the Director if the Director was asking Petitioner to turn in his pager, to which the Director said “yes.”<sup>34</sup> The Director testified that Petitioner volunteered the pager as an alternative to resignation.<sup>35</sup>

The Administrative Law Judge has resolved this factual difference in favor of the Respondent because other facts make the Director’s version of the events the more credible version. For example, it is undisputed that, when Director Scoblic met with Petitioner on October 4, 2006, he did not tell Petitioner he was being discharged. Petitioner’s testimony confirms that Director Scoblic never told him he was being discharged. Instead, he asked Petitioner to resign.<sup>36</sup> In addition, at the October 4<sup>th</sup> meeting, the Director explained why he was asking for Petitioner’s resignation, which included Ms. Keimig’s complaint and those of others.<sup>37</sup> Petitioner’s testimony confirms this. Director Scoblic knew that Petitioner could not be discharged without a hearing.<sup>38</sup> Moreover, the Director had no authority to discharge Petitioner; he had authority only to ask for Petitioner’s resignation, and the Director knew that.<sup>39</sup> These additional facts add credibility to the Director’s testimony that he did not ask Petitioner to turn in the pager.

The actions of the Director on October 4<sup>th</sup> did not make it “unlikely or improbable” that Petitioner could return to the job. Although it is certain that

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<sup>32</sup> Minn. Stat. § 197.46.

<sup>33</sup> *Myers v. City of Oakdale*, 409 N.W.2d 848, 850-51 (Minn.1987).

<sup>34</sup> Test. of Pet.

<sup>35</sup> Test. of T. Scoblic.

<sup>36</sup> Test. of Pet.; Test. of T. Scoblic.

<sup>37</sup> Test. of Pet.; Test. of T. Scoblic.

<sup>38</sup> Test. of T. Scoblic.

<sup>39</sup> Test. of T. Scoblic; Test. of K. Korth; Test. of J. Hasslen.

Petitioner could not take call without a pager, it was Petitioner's decision to turn in the pager.

Respondent's subsequent actions confirm that it did not regard Petitioner's case as "closed" once the pager was turned in. As of October 4<sup>th</sup>, no disciplinary action had been taken as to Petitioner. The Service, however, believed that disciplinary action was appropriate, as reflected in the discussions of the Board during its August meeting.<sup>40</sup> The conversation of October 4<sup>th</sup> between Petitioner and the Director left disciplinary action unresolved. Since it was up to the City Council whether such action would be taken, the Director took his recommendation for discipline to the Council's next meeting.<sup>41</sup>

Petitioner argues that he was constructively discharged for the period of time during which he had no pager. The ALJ has resolved that issue by finding that it was Petitioner who chose to give up the pager. Thus, there can be no constructive discharge by Respondent. But Petitioner goes on to argue that the constructive discharge continued even after the return of the pager. According to Petitioner's argument, he could not return to work because of a "hostile environment" at the Service. Respondent's failure to resolve the "hostile environment" at the Service amounts to a constructive discharge, the argument goes.<sup>42</sup> Petitioner cites no VPA decisions in support of this argument. Instead, he cites workplace harassment cases.<sup>43</sup>

The evidence as a whole does not support the hostile work environment Petitioner alleges, and certainly not an environment so hostile it would amount to a constructive discharge situation. On the contrary, one of the witnesses testified he would willingly work with Petitioner, if Petitioner would sign up on the schedule.<sup>44</sup> Petitioner testified that he felt there was tension during the meetings with the Director.<sup>45</sup> But the Director's testimony reflects it was Petitioner who was combative. Because of Petitioner's hostility at the October 4<sup>th</sup> meeting, the Director asked another Board member to be present at the November 7<sup>th</sup> meeting.<sup>46</sup> Petitioner also testified to his impression that there had been a letter-writing campaign against him, but this is also not supported by evidence in the record. In sum, the facts do not support Petitioner's theory of a hostile environment amounting to a constructive discharge.

## **L. F. C.**

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<sup>40</sup> Test. of K. Korth; Test. of J. Hasslen; Test. of T. Scoblic.

<sup>41</sup> Test. of J. Hasslen; Test. of T. Scoblic; Pet. Ex. D.

<sup>42</sup> Resp. Ex. C.

<sup>43</sup> See, e.g., *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410 (Minn. App. 1995).

<sup>44</sup> Test. of J. Hasslen.

<sup>45</sup> Test. of Pet.

<sup>46</sup> Test. of T. Scoblic; Test. of J. Hasslen.